No. 04-197

IN THE

Supreme Court of the United States

BRIAN KILCULLEN,

Petitioner,

v.

GUY A. LEWIS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS EG&G, INC., EG&G TECHNICAL SERVICES, INC., GEORGE MELTON, JERRY HAWKINS, AND JOHN DENT

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STATEMENT PURSUANT TO RULE 29.6

Respondent, EG&G Technical Services, Inc. is wholly owned by URS Corporation.

Respondent, EG&G, Inc. is now known as PerkinElmer, Inc., a publicly traded company*

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* EG&G, Inc. and EG&G Technical Services, Inc. were related when Petitioner filed his original suit but are no longer related entities.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities iii

Table of Appendices iv

Introduction 1

Statement of the Case 1

Reasons for Denying the Petition 5

Argument 6

I. Kilcullen Has Not Identified Any Basis For This Court's Limited Certiorari Jurisdiction. 6

II. The United States District Court And The Eleventh Circuit Correctly Rejected Kilcullen's Arguments. 7

A. Kilcullen had no standing to sue. 7

B. Kilcullen never established any discovery violation by EG&G or any of the government defendants. 8

C. The statute of limitations bars Kilcullen's claims. 9

Conclusion 10

TABLE OF CITED AUTHORITIES

Page

CASES

Kelley v. Serana,
87 F 3d 1235 (11th Cir. 1996) 9

Maguire v. Municipality of Old Orchard Beach,
783 F. Supp. 1475 (D. Maine 1992) 9

McCaleb v. A.O. Smith Corp.,
200 F 3d 747 (11th Cir. 2000) 9

McLaughlin v. Copeland,
455 F. Supp. 749 (D. Del. 1978) 9

National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distrib. Co.,
748 F. 2d 602 (11th Cir. 1985) 8

Palazzo v. Gulf Oil Corp.,
764 F. 2d 1381 (11th Cir. 1985) 8

Rowland v. California Men's Colony, Unit II Men's Advisory Council,
506 U.S. 194 (1993) 8

Warth v. Seldin,
422 U.S. 490 (1975) 7

STATUTES

Section 95.11, Florida Statute 9

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States District Court For The Southern District Of Florida Dated And Filed April 20, 2004 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of Florida Dated And Filed May 12, 2004 ..... 5a

INTRODUCTION

Petitioner, Brian Kilcullen's ("Kilcullen") Petition for Writ of Certiorari does not identify any basis for this Court's exercise of its very limited, narrow jurisdiction. Moreover, Kilcullen's presentation of facts, replete with events outside of any court record and without any support, paints a wildly distorted picture of the true history of this case. When stripped to its essence, this case involves two basic legal issues that neither implicate this Court's limited jurisdiction nor identify any basis for relief: first, whether the United States District Court, Southern District, correctly concluded that Kilcullen lacked standing to sue when he suffered no injury, and second, whether a corporate entity has the authority to proceed *pro se* notwithstanding an unbroken line of authority specifically holding that it does not. Kilcullen describes a fantastic conspiracy, allegedly perpetrated by various branches of government and private individuals, to deprive him of his rights. There is no merit to the outrageous proclamations and Kilcullen's Petition should be denied.

STATEMENT OF THE CASE

Skyknight Air Services, Inc. ("Skyknight"), a corporate entity, purchased at a government auction a Swearingen Merlin III aircraft, registration number N802ME (the "aircraft"). The aircraft was originally advertised for sale at the auction without a complete set of logbooks or avionics (B-1).[1] Skyknight, Kilcullen's corporation, successfully bid

1. For the Court's convenience, references will be made to Kilcullen's Appendix unless specifically designated otherwise. The factual recitation contained herein is derived from the District Court's Final Order of Dismissal, which accepted all of Kilcullen's allegations as true.

on and purchased the aircraft. After purchasing the aircraft, Skyknight obtained possession of the log books believed missing and attempted to sell the aircraft with a complete set of logbooks for profit (B-1 at 4). Kilcullen alleged that EG&G and its principals conspired to devalue the aircraft by concealing the existence of logbooks but sold Skyknight both the aircraft and the logbooks (B-1 at 4).

Upon discovering Skyknight's possession of the missing log books, the Government seized the aircraft, and Skyknight sued the United States Government and the United States Custom Service as well as EG&G, Inc., EG&G Technical Services, Inc., George Melton, Jerry Hawkins, and John Dent (collectively "EG&G"). EG&G's only role in this controversy was as an independent contractor for the government to conduct the subject auction. Otherwise, EG&G is not a government entity and did not participate in any seizure of Skyknight's aircraft or log books.

Skyknight initiated its lawsuit against EG&G and the government defendants (B1-5). Skyknight sought injunctive relief and alleged "improper seizure" against the government defendants and several discovery issues arose (B1-5-6). The civil case was stayed pending disposition of a criminal investigation (B1-6). Skyknight also sued EG&G for breach of contract, breach of implied contract, negligent misrepresentation, and tortious interference (B1-6). It filed its action in state court, but EG&G removed it and the case came before Judge Wilkie Ferguson, who also adjudicated the lawsuit against the government defendants (B1-6). As in the lawsuit against the federal defendants, several discovery disputes arose, but Judge Ferguson dismissed the action for failure to state a claim and denied Skyknight's Motion for Reconsideration (B1-6).

On February 9, 1998, the United States Customs Service released the aircraft to Skyknight, which sold it for a profit (B1-6). Skyknight then filed another lawsuit against EG&G (and the government defendants) which was assigned to District Court Judge William J. Zloch. The basis of the lawsuit, which the District Court ultimately dismissed and which resulted in the Final Order of Dismissal that is the genesis of the case now pending before this Court, rested solely on grounds that EG&G and the government defendants committed discovery violations in the previous cases before Judge Ferguson (B1-7).

Because Skyknight did not have counsel, the District Judge ordered it to obtain representation (B1-2). Skyknight refused to obtain counsel, but its President, Kilcullen, attempted to intervene to either modify the Complaint or to substitute Kilcullen in place of Skyknight (B1-2). The District Court treated Kilcullen's efforts to intervene as a Motion to Amend the Complaint and granted it, but noted that Kilcullen must establish standing to sue because Skyknight was the sole record owner of the subject aircraft (B1-2-3).

On December 27, 2002, Kilcullen filed an Amended Complaint, alleging the same facts and causes of action as the Complaint, but without including Skyknight as a party (B1-3). Kilcullen's Amended Complaint alleged nine claims for relief. Six of these claims were common law torts: negligent misrepresentation, fraudulent misrepresentation, fraud in the inducement, tortious interference with a business, fraudulent non-disclosure and concealment, and infliction of emotional distress. (B1-3). Kilcullen then relied on the alleged tortious conduct as predicate acts to seek damages

under state and federal racketeering statutes (B1-3).[2] Kilcullen relied on alleged discovery violations which occurred during the two cases before Judge Ferguson involving Skyknight as a basis for his personal causes of action. There has never been any Order suggesting that EG&G or any government agency Kilcullen sued committed any discovery violations.

After full consideration of each purported claim for relief, the District Court dismissed Kilcullen's Amended Complaint (B1-8-18). The District Court ruled that it did not have jurisdiction to grant Kilcullen injunctive relief from Judge Ferguson's Orders, concluding that "[t]his court does not have jurisdiction to review, modify or enjoin a final order or decision of another judge in the Southern District of Florida; that is the role of the United States Court of Appeals for the Eleventh Circuit." (B1-9).

The District Court dismissed the remainder of Kilcullen's claims based on its finding that Kilcullen's state and common law claims were allegedly suffered by Skyknight and not Kilcullen individually (B1-9-12). Therefore, the District Court ruled that Kilcullen lacked standing to pursue these claims (B1-9-13). The District Court made similar findings as to Kilcullen's RICO and Civil Rights Claims, concluding that Kilcullen's alleged injuries were actually those suffered by Skyknight and that Kilcullen did not have standing (B1-12-14). The District Court further concluded that the statute of limitations blocked each of Kilcullen's alleged state

2. Additionally, Kilcullen sought injunctive relief from Orders Taxing Costs issued in Case Nos. 97-7027 and 97-3765. Skyknight previously sought relief from these Orders by filing Motions in those cases. Subsequent to filing the Complaint in this case, Judge Ferguson denied Skyknight's Motions.

and common law claims for relief, as well as his civil rights claim (B1-15).

Following entry of the District Court's Final Order, Kilcullen appealed to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit affirmed the decision, and Kilcullen filed a Petition for Rehearing En Banc and also a Motion for Sanctions and Disciplinary Action against all defendants and their attorneys (A-1). The Eleventh Circuit denied the Petition for Rehearing En Banc and sanctioned Kilcullen for the frivolous request for sanctions and disciplinary action (A-2). Following issuance of the Eleventh Circuit's Mandate, Kilcullen filed a Motion for Rule 60(B) Relief From Judgment and Monetary Sanctions in the District Court, rearguing the case he presented to the Eleventh Circuit. District Court Judge Zloch denied the Motion. Kilcullen next filed a Motion for Reconsideration And/Or Recusal. The District Court denied this Motion as well, and Kilcullen now seeks relief in this Court (EG&G-1 and 2).

REASONS FOR DENYING THE PETITION

Although it is difficult to pinpoint Kilcullen's argument, the crux of his case is that several branches of the government have conspired to deprive him of his rights. Notably, while his claims are both outrageous and unsupported, he continues to sue EG&G, notwithstanding that it is a private entity whose only role in this controversy was to run the auction and facilitate the sale of the aircraft. The Petition is completely meritless. Neither the underlying District Court Final Order of Dismissal nor the Eleventh Circuit's affirmance thereof conflicts with any decision of this Court or any Circuit Court of Appeal. Indeed, Kilcullen never identifies any such conflict, but instead seeks *de novo* review through his

Petition of the myriad claims he advanced in his original Amended Complaint dismissed by the District Court. This is procedurally improper and his claims have no support in law or fact.

ARGUMENT

I. KILCULLEN HAS NOT IDENTIFIED ANY BASIS FOR THIS COURT'S LIMITED CERTIORARI JURISDICTION.

Kilcullen identifies no basis for this Court to exercise its narrow certiorari jurisdiction, but merely reargues the same position that has been rejected by the District Court and the Eleventh Circuit Court of Appeal. Moreover, Kilcullen has sought rehearing and reconsideration of every adverse decision he has faced. At every level, Courts have been sensitive to Kilcullen's *pro se* status and afforded him with opportunities to engage in liberal pleading. Nonetheless, Kilcullen cannot state a claim against EG&G and the District Court has correctly dismissed the Amended Complaint.

Kilcullen's challenge to the Eleventh Circuit's ruling centers upon alleged discovery violations committed by EG&G and the government defendants. Although this is unsupported and has been rejected, it does not suggest a conflict among the Circuit Courts of Appeal or present a question of federal law that remains unresolved but should be addressed. In the absence of any statement for why this Court should review this matter, the Court should deny certiorari.

II. THE UNITED STATES DISTRICT COURT AND THE ELEVENTH CIRCUIT CORRECTLY REJECTED KILCULLEN'S ARGUMENTS.

The District Court's dismissal of Kilcullen's lawsuit and the Eleventh Circuit's affirmance thereof are correct as a matter of law.

A. Kilcullen had no standing to sue.

Because Kilcullen suffered no injury, the District Judge and the Eleventh Circuit correctly determined that Kilcullen lacks standing to pursue any of the alleged claims. Standing is a threshold question in any federal case. *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975). "A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action." *Id.* The District Court properly recognized that Kilcullen has no standing to allege any cause of action arising from the sale and purchase of the aircraft, because he was not a party to that transaction. Skyknight, not Kilcullen, participated in the auction and ultimately purchased the aircraft. Skyknight, not Kilcullen, entered into an agreement to re-sell the aircraft to a third party. Accordingly, there exists no set of facts or circumstances under which Kilcullen could claim an individual loss based on the transaction at issue. The only reason Kilcullen attempted to amend the Complaint to name himself as the plaintiff below was a transparent attempt to circumvent the requirement that a corporation proceed with counsel. Despite the admonishment by the District Court that Skyknight hire

counsel, Kilcullen sought to evade this ruling by attempting to sue individually.[3]

Assuming that Kilcullen sued on behalf of Skyknight (the real party in interest), the District Court correctly dismissed the action because it is well settled that a corporation cannot proceed *pro se*. *See Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201-202 (1993) ("It has been the law for a better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel."). The longstanding rule against a corporation proceeding *pro se* "ensures that a licensed attorney, an officer of the court, is responsible for conducting the corporation's litigation. It protects the court and the public from unscrupulous and irresponsible behavior." *National Indep. Theatre Exhibitors, Inc. v. Buena Vista Distrib. Co.*, 748 F.2d 602, 609 (11th Cir. 1985). An officer or shareholder may not *pro se* represent a corporation. *See Nat'l Indep. Theater Exhibitors, Inc. v. Buena Vista Dist. Co.*, 748 F.2d 602 (11th Cir. 1985); *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985).

B. Kilcullen never established any discovery violation by EG&G or any of the government defendants.

Kilcullen argues, as he did before the lower courts, that the District Court's discovery Orders reflect a conspiracy to conceal the truth and deprive him from his day in court. When Kilcullen sued below, Respondents properly objected

3. Skyknight attempted to bring an appeal before the Eleventh Circuit in the case of *Skyknight Air Services, Inc. v. EG&G Dynatrend, Inc.*, Case No. 98-05740, which the Eleventh Circuit promptly dismissed because Skyknight was not represented by counsel.

to discovery pending disposition of their successful Motion to Dismiss. Courts have held that "where the plaintiff fails to state a claim, he is not entitled to discovery merely to find out whether or not there is a factual basis for his claim." *Maguire v. Municipality of Old Orchard Beach*, 783 F. Supp. 1475, 1488 (D. Maine 1992) (citations omitted); *see also McLaughlin v. Copeland*, 455 F. Supp. 749, 753 (D. Del. 1978). This is appropriate and does not constitute fraud.

C. The statute of limitations bars Kilcullen's claims.

The District Court and Eleventh Circuit correctly concluded that the applicable statute of limitations barred Kilcullen's state and common law claims (B1-15). Pursuant to Florida Statute § 95.11, Kilcullen's fraud and negligence claims were subject to a four-year statute of limitations. The District Court concluded that Kilcullen was aware of any alleged cause of action in July, 1997 but waited until July 2002 to sue (B1-15). The District Court further noted that Kilcullen's civil rights claims were time barred under the limitations applicable to claims for personal injury. *See Kelley v. Serana*, 87 F.3d 1235, 1238 (11th Cir. 1996). The limitations period on Kilcullen's federal civil Rico claims are also barred by a four-year limitations statute. *See McCaleb v. A.O. Smith Corp.*, 200 F 3d 747, 751 (11th Cir. 2000) (B1 at 16).[4]

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4. The District Court did conclude that Kilcullen's Florida civil Rico statute would not be time barred because he filed it within the five-year limitations period, but nonetheless dismissed the claim for lack of standing as the injury alleged occurred solely to Skyknight.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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